

CABINET FOR FAMILIES AND CHILDREN

DEPARTMENT FOR COMMUNITY BASED SERVICES

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DIVISION OF CHILD SUPPORT



Information Release #869

TO: All IV-D Agents

DATE: January 19, 2001

SUBJECT: Legal Opinion CFC-OC-00-004 (December 4, 2000)

Kentucky Bar Association's Advisory Ethics Opinion, KBA E-414,
Concerning an Attorney-Client Relationship between IV-D
Contracting Officials and Recipients of IV-D Services

Legal Opinion CFC-OC-00-004 provides recommendations from Office of the General Counsel (OGC) on how to better clarify to recipients of IV-D services that they do not have an attorney-client relationship with Cabinet for Families and Children (CFC) IV-D contracting officials. These recommendations were made in order to assure compliance with the Kentucky Bar Association's (KBA's) Advisory Ethics Opinion, KBA E-414.

Kentucky Revised Statute (KRS) 205.712(7) states that contracting officials represent CFC and do not have an attorney-client relationship with custodial parents. This statute specifies the following:

Where the local county attorney, friend of the court, domestic relations agent, or other designee of the cabinet has been contracted for the purpose of administering child support enforcement pursuant to Title IV-D of the Social Security Act, the contracting official shall be deemed to be representing the cabinet and as such does not have an attorney-client relationship with the applicant who has requested services pursuant to Title IV-D of the Social Security Act nor with any dependent on behalf of the individuals for whom services are sought.

In KBA E-414, the KBA determined that KRS 205.712(7) is not conclusive as to the nonexistence of an attorney-client relationship between contracting officials and recipients of IV-D services. This determination is based on a well-accepted principle in Kentucky that the regulation of the legal profession is within the sphere of the courts, not the legislature. Given this history of a separation of power, a contracting official cannot rely solely on KRS 207.712(7) to ensure that an attorney client relationship does not exist when IV-D services are provided.



According to KBA E-414, an attorney can be found to have an attorney-client relationship with the party seeking child support services if that party has a reasonable belief or expectation that an attorney-client relationship exists. In order for a contracting official to establish the nonexistence of an attorney-client relationship, the contracting official must provide the recipient of IV-D services with enough information so that a reasonable person will understand that no attorney-client relationship exists.

As to what is necessary for a reasonable person to understand that an attorney-client relationship does not exist, the last paragraph of KBA-414 specifies the following:

To the extent that an attorney pursuing a child support enforcement matter wishes to ensure that no attorney-client relationship exists between that attorney and a party seeking child support enforcement services, the attorney must take steps that would make any belief in the existence of an attorney-client relationship unreasonable. To this end the attorney should fully discuss the attorney's role in the proceeding with the party seeking enforcement services and explain the lack of an attorney-client relationship to that party. In making such a disclosure and explanation, the attorney should explain the consequences of the lack of an attorney-client relationship on such issues as confidentiality and the attorney-client privilege. The attorney would be well-advised, though it is not required by the KRPC, to provide a written explanation of the relationship to every party seeking child support enforcement services.

Based upon the explanation given above, OGC has suggested several additional steps and precautions that need to be taken by CFC and IV-D contracting officials. These steps will assure that recipients of IV-D services realize that an attorney-client relationship does not exist when they apply for and receive child support services.

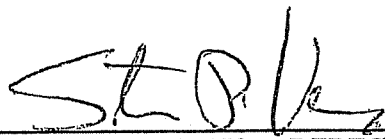
The primary recommendation of OGC to reinforce the position that an attorney-client relationship does not exist between the contracting official (or an attorney who works for him or her) and the recipient of IV-D services is for the official to explain directly to the person exactly what the official's role is in representing CFC. The contracting official also needs to explain the consequences of the lack of an attorney-client relationship in regard to confidentiality and attorney-client privilege.

The contracting official, or a member of his or her legal staff, may make this explanation directly to the recipient of IV-D services before child support legal services begin. The contracting official also may make this explanation by discussing the contents of the Authorization and Acknowledgement of No Legal Representation (Form CS-11) before the CS-11 is signed and notarized.

The other recommendations from OGC concern making minor revisions to the CS-11 and to the Non-K-TAP Application (Form CS-33). For example, a paragraph could be added to the CS-11 that might state: "I understand that an attorney-client relationship does not exist between the contracting official and me, and I understand the consequences of this on the issues of confidentiality and attorney-client privilege." Also, the last sentence on the CS-33 could be expanded to add a clause that would specify ". . . and there is no attorney-client relationship between the contracting official and me."

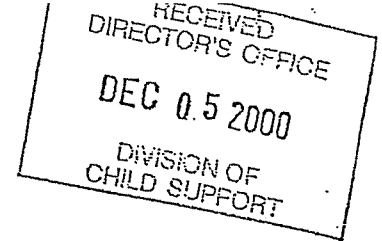
The changes to the CS-11 and the CS-33 recommended by OGC will be made when the forms are revised. However, the basic premise of legal opinion CFC-OC-00-004 is that a discussion between the contracting official and the recipient of IV-D services must occur so that a reasonable person will understand that there is not an attorney-client relationship.

A hard copy of Legal Opinion CFC-OC-00-004 will be sent to Service Region Administrators, IV-D contracting officials, area office managers, and other CFC staff who are on the distribution list to receive legal opinions. Either Information Release #869 or Information Memorandum 01-02 will be enclosed with the hard copy of Legal Opinion CFC-OC-00-004.


STEVEN P. VENO, DIRECTOR
DIVISION OF CHILD SUPPORT



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OFFICE OF THE GENERAL COUNSEL

December 4, 2000

CFC-OC-00-004

TO: Steven P. Veno, Director
Division of Child Support

FROM: William K. Moore, Jr.
General Counsel

Charles P. Lawrence
Assistant Counsel

RE: KBA E-414

SYNOPSIS: In order to better assure compliance with the Kentucky Bar Association's advisory ethics opinion, KBA E-414, concerning the steps to be taken before the nonexistence of the attorney-client relationship between the Title IV-D client and the contracting official would be clear to a reasonable person, it would be necessary for the contracting official or one of his legal staff to discuss this matter directly with the Title IV-D client prior to the commencement of services. The discussion, for example, could occur in relation to the client's execution of form CS-11, AUTHORIZATION AND ACKNOWLEDGEMENT OF NO LEGAL REPRESENTATION, and would relate to matters such as exactly what the contracting official's role is in representing the Cabinet and the consequences of the lack of such a relationship on matters such as confidentiality and the attorney-client privilege. Minor revisions to the form CS-11 and the Title IV-D applications would also help the client to understand that he or she has no attorney-client relationship with the contracting official.

This is given pursuant to your request for this office to provide you with recommendations on how to better clarify, for the benefit of Title IV-D child support clients, that they have no attorney-client relationship with the Cabinet's IV-D attorneys who provide child support enforcement services.



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The Title IV-D application which you have provided to this office for review, form CS-33, Non-K-Tap Application, contains a statement within the certification above the signature line of the client which states that "I also understand as explained to me in the Authorization and Acknowledgement of No Legal Representation (Form CS-11), which I have signed, that IV-D contracting officials employed by the Cabinet for Families and Children represent the state and not me."

Kentucky child support statutory law at KRS 205.712(7) also provides:

(7) Where the local county attorney, friend of the court, domestic relations agent, or other designee of the Cabinet has been contracted for the purpose of administering child support enforcement pursuant to Title IV-D of the Social Security Act, the contracting official shall be deemed to be representing the Cabinet and as such does not have an attorney-client relationship with the applicant who has requested services pursuant to Title IV-D of the Social Security Act nor with any dependent on behalf of the individuals for whom services are sought.

In the Kentucky Bar Association's ethics opinion, KBA E-414, the KBA determined that the statute itself is not dispositive as to the existence or nonexistence of an attorney-client relationship and that the essential standard is "[i]f a reasonable person would understand that there is not an attorney-client relationship, then no relationship exists." The KBA, in its opinion, recognized that there is no absolute rule which could be stated to determine the existence of an attorney-client relationship and each situation and interaction between the Title IV-D client and contracting official would have to be evaluated individually.

It is unclear from the KBA opinion how much background information was provided apart from the opinion requester's cite to the applicable statute, or whether the KBA was aware of the separate form CS-11, entitled in bold print **AUTHORIZATION AND ACKNOWLEDGEMENT OF NO LEGAL REPRESENTATION**, a one-page form which the client signs and has notarized, and which contains the following language:

If you use a Cabinet for Families and Children (CFC) contracting official, your signature on this application authorizes and acknowledges the following:

12/04/00

1. I request CFC to assist me in my child support case, including court action, if necessary.
2. I acknowledge that any CFC attorney to whom I may be referred will be dealing with me solely pursuant to his or her obligation to provide legal services to and for CFC and the Commonwealth of Kentucky.
3. I understand that I am not legally presented by a CFC attorney and that a CFC ATTORNEY MAY TAKE A POSITION UNFAVORABLE TO ME.
4. I understand that I have the RIGHT TO OBTAIN LEGAL REPRESENTATION FOR MYSELF at any time I choose, now or in the future, and I will be responsible for attorney fees and costs.

Depending upon the discussion, if any, between the client and the contracting official surrounding the execution of this form, and the questions of the client and answers provided by the contracting official, the client may be in receipt of enough information (and presumably understands) that he or she is not in an attorney-client relationship with the contracting official, or, at a minimum, enough information and disclosure has been made so that a reasonable person would understand that there is no attorney-client relationship between the Title IV-D client and the contracting official.

As to the crucial question of what may be necessary in order that a reasonable person understands that no attorney-client relationship exists, the final paragraph of KBA E-414 is instructive:

To the extent that an attorney pursuing a child support enforcement matter wishes to ensure that no attorney-client relationship exists between that attorney and a party seeking child support enforcement services, the attorney must take steps that would make any belief in the existence of an attorney-client relationship unreasonable. To this end the attorney should fully discuss the attorney's role in the proceeding with the party seeking enforcement services and explain the lack of an attorney-client relationship to that party. In making such a disclosure and explanation, the attorney should explain the consequences of the lack of an attorney-client relationship on such issues as confidentiality and the attorney-client privilege. The

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attorney would be well- advised, though it is not required by the KRPC, to provide a written explanation of the relationship to every party seeking child support enforcement services.

Based upon the foregoing elaboration, it appears to this office that a few additional steps and precautions may be taken by the Cabinet and the contracting officials to assure sufficient disclosure concerning the nonexistence of an attorney-client relationship.

RECOMMENDATIONS

The primary recommendation of this office to buttress the position that there exists no attorney-client relationship between the contracting official and the Title IV-D client would be for the contracting official, or an attorney who works for him in the Title IV-D program, to explain directly to the Title IV-D client, consistent with the direction given in KBA E-414 excerpted above, exactly what the contracting official's role is in representing the Cabinet and the consequences of the lack of such a relationship on matters such as confidentiality and attorney-client privilege.

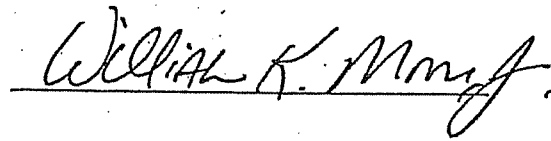
If the current procedures do not provide for such a direct explanation before child support enforcement legal services are commenced by the contracting official, then consideration should be given to revising such procedures to accomplish this. For example, the form CS-11, AUTHORIZATION AND ACKNOWLEDGEMENT OF NO LEGAL REPRESENTATION, could be fully explained by the contracting official (or one of his legal staff) to the Title IV-D client. A paragraph could be added to this form which could state, for example, "I understand that no attorney-client relationship will exist between the contracting official and me, and the consequences of the lack of an attorney-client relationship on issues such as confidentiality and the attorney-client privilege." A statement could also be added to the form reflecting that the contracting official, or one of his legal staff, had discussed the form with the Title IV-D client, followed by a signature line where the contracting official or his designee could sign.

In the application form GS-33 which was provided to this office, there is a statement in the last sentence of the applicant's certification on page 4 as to the applicant's understanding that contracting officials "represent the state and not me." This sentence could be enlarged and emboldened, and a phrase added to the end after the word "me" which reads "and there is no attorney-client relationship between the contracting official and me." This form appears to be executed after the client/applicant has signed the form CS-11, therefore it appears to be necessary for the client/applicant to have the discussion with the contracting official about the CS-11 and the nonexistence of the attorney-client relationship before the application is signed.

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There may be alternatives apart from that discussed above, to satisfy KBA E-414, which the Division of Child Support may desire to implement for reasons of procedural and administrative convenience, after consultation with this office. However, it appears to be the basic and primary holding of the opinion that a discussion between the contracting official and the Title IV-D applicant/client must take place to the extent "that a reasonable person would understand that there is not an attorney-client relationship."

If you have additional questions, please advise.

A handwritten signature in cursive script, reading "William K. Mercer", is written over a horizontal line.

C: G. Thomas Mercer
Assistant General Counsel

Graddy Johnson
Assistant Counsel

